Nos. 80-486 and 80-490

In the Supreme Court of the United States

OCTOBER TERM, 1980

CONSTANTINE "GUS" KARAS, PETITIONER

v.

UNITED STATES OF AMERICA

JOSEPH NICHOLAS PECORA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a county prosecutor's office is an "enterprise engaged in, or the activities of which affect,

interstate or foreign commerce" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq*.

2. Whether the district court erred in refusing to extend to this case a grant of immunity given petitioner Karas for his testimony in a previous case (No. 80–486 only).

3. Whether the prosecutor's closing argument was improper (No. 80–490 only).

4. Whether the district court adequately instructed the jury with respect to "a pattern of racketeering activity" under RICO (No. 80–490 only).

5. Whether the district court's instruction on the defense of entrapment was incorrect.

6. Whether petitioner Karas was entrapped as a matter of law (No. 80–486 only).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a)[1] is reported at 624 F.2d 500.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1980. A petition for rehearing in No. 80-486 was denied on July 31, 1980, and a petition for rehearing in No. 80-490 was denied on July 28, 1980. The petition for a writ of certiorari in No. 80-486 was filed on September 26, 1980, and the petition for a writ of certiorari in No. 80-490 was filed on September 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of West Virginia, petitioners were convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(d). Petitioner Karas was sentenced to five years' imprisonment and fined $5,000. Petitioner Pecora was sentenced to five years' imprisonment and fined $10,000. The court of appeals affirmed (Pet. App. 1a-11a).

The evidence at trial established that petitioners, who were gambling operators in Hancock County, West Virginia, participated in a conspiracy to bribe

[1] "Pet. App." refers to the appendix to the petition in No. 80-486.

county law enforcement officials in order to "protect" their gambling activities.

Beginning in early 1977, Ronald Donell, the sheriff of Hancock County, undertook an investigation of gambling activity in the county and the suspected bribery of county officials by gambling operators (II A. 264).[2] On January 13, 1978, he met with the proprietors of three gambling establishments, including petitioner Karas, and ordered them to cease their activities by the following Monday (II A. 272–273). However, in October 1978, the gambling establishments were still operating (II A. 275–277). Donell brought this fact to the attention of Robert Altomare, the county's prosecuting attorney, who told Donell to come to his office to prepare search warrant requests (II A. 281–282).

On October 20, 1978, Altomare advised Donell that the raids of the gambling establishments should be called off because five operators were willing to pay them $1,500 not to interfere with these activities; this conversation was secretly recorded by Donell (Govt. Exh. 29). Shortly thereafter, petitioner Karas appeared in Donell's office to negotiate the $1,500 deal with Donell; this conversation was also secretly recorded (Govt. Exh. 30 and 30(a)). On three subsequent occasions, petitioner Karas made payoffs of $1,500 to Donell. In each instance, Donell turned over his share to the FBI and paid $750 to prosecutor Altomare (II A. 315, 318, 320–321).

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[2] "A." refers to petitioners' joint appendix in the court of appeals; "Govt. Exh." refers to the government's exhibits at trial.

In December 1978 and January 1979, Sheriff Donell received three payments of $250—one of which came from Altomare (II A. 429–430)—for "protection" of a barbout (dice) game run by petitioner Pecora (II A. 432). On January 15, 1979, Donell met with petitioner Pecora to determine if he was aware of the payments (*ibid.*). In the course of their conversation, which was recorded, petitioner Pecora acknowledged the payments and agreed that future payoffs would be made through Altomare (Govt. Exh. 44 and 44(a)).[3]

ARGUMENT

1. Petitioners were convicted of conspiring to violate 18 U.S.C. 1962(c). That statute makes it a crime for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity * * *." The "enterprise" charged in this case was the office of the prosecuting attorney of Hancock County. Relying principally on *United States* v. *Anderson*, 626 F.2d 1358 (8th Cir. 1980), petitioners contend (80–486 Pet. 11–15; 80–490 Pet. 9–12) that such a governmental agency is not an "enterprise" within the meaning of the statute.

Petitioners' argument is without merit. Under 18 U.S.C. 1961(4), an "enterprise" is broadly defined to include "any individual, partnership, corporation, as-

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[3] Altomare was convicted in a separate trial of the RICO conspiracy and other offenses. He was sentenced to 10 years' imprisonment and fined $5,000.

sociation, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." Every court of appeals to address the issue has held that a governmental agency constitutes an "enterprise" within the meaning of Section 1961(4). See *United States* v. *Altomare*, 625 F.2d 5 (4th Cir. 1980) (prosecutor's office);[4] *United States* v. *Baker*, 617 F.2d 1060 (4th Cir. 1980) (sheriff's office); *United States* v. *Bacheler*, 611 F.2d 443 (3d Cir. 1979) (Philadelphia Traffic Court); *United States* v. *Grzywacz*, 603 F.2d 682 (7th Cir. 1979), cert. denied, No. 79-1221 (May 12, 1980) (police department); *United States* v. *Frumento*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978) (Pennsylvania Bureau of Cigarettes and Beverage Taxes); *United States* v. *Brown*, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978) (police department). In the absence of a conflict among the circuits, review of the issue by this Court is unwarranted.[5]

There is also no merit to petitioners' argument (80-486 Pet. 13-14; 80-490 Pet. 12-13) that the evidence

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[4] *Altomare* involved the same RICO conspiracy prosecuted in this case.

[5] Petitioner Karas' reliance (80-486 Pet. 12) on *United States* v. *Anderson*, *supra*, is misplaced. In *Anderson*, two county administrators in Arkansas were indicted under RICO for authorizing payment of bogus vouchers as part of a scheme to collect money from the county for merchandise that was never delivered. However, the "enterprise" charged in that case was not a government agency, but an illegitimate "association in fact" consisting of the two defendants and a third party. Although holding that this alleged enterprise did not fall within RICO, the court of appeals expressly reserved decision on the question whether the county government could have been charged as the enterprise under the statute (626 F.2d at 1365 n.10).

failed to establish that the county prosecutor's office was "engaged in" or "affect[ed]" interstate commerce within the meaning of Section 1962(c). The record reveals (II A. 486–491) that interstate telephone calls were regularly placed from the prosecutor's office, that certain of the supplies and materials purchased by the office were manufactured outside the state, and that persons who were not citizens or residents of the state were involved in investigations and litigation conducted by the prosecutor's office. These contacts provided a sufficient basis for invoking RICO jurisdiction over the prosecutor's office. See *Perez* v. *United States*, 402 U.S. 146 (1971); *United States* v. *Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).[6]

Petitioner Karas further argues (Pet. 15) that even if the prosecutor's office was an enterprise engaged in or affecting interstate commerce within the meaning of the statute, the evidence failed to establish that he was "employed by or associated with" this enterprise. But petitioners' bribery of the county prosecutor for the purpose of influencing his conduct in office was a sufficient "association" with the office to bring them within the reach of the statute, especially in view of the statute's broad remedial purpose of combatting

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[6] Contrary to petitioners' suggestion (80–486 Pet. 14–15; 80–490 Pet. 13), the statute does not require that each predicate act of racketeering have an effect on interstate commerce. See *United States* v. *Rone*, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied *sub nom. Little* v. *United States*, 445 U.S. 946 (1980); cf. *McLain* v. *Real Estate Bd. of New Orleans*, 444 U.S. 232, 242–243 (1980).

racketeering. See *United States* v. *Elliott*, 571 F.2d 880, 903 (5th Cir.), cert. denied, 439 U.S. 953 (1978).[7]

2. Prior to this case, the government and petitioner Karas had agreed upon a grant of immunity to cover Karas' testimony at a trial of a co-conspirator. Although he never testified at that trial, there was a stipulation as to his testimony. At the present trial, Karas sought a preliminary ruling that the grant of immunity was still in effect and therefore that any testimony he gave in his own behalf could not be used in subsequent criminal proceedings. He contends (Pet. 6–11) that the district court's refusal to extend the earlier grant of immunity deprived him of his right to present a defense.

The courts below properly rejected petitioner's claim to this extended immunity. The decision to grant immunity is within the sole discretion of the prosecution (see, *e.g.*, *Thompson* v. *Garrison*, 516 F.2d 986 (4th Cir. 1975); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973)), and the prosecution did not grant petitioner immunity in the instant case (III A. 632–633). Nor, by its terms and obvious purpose, was the earlier grant of immunity applicable of its own force to Karas' tes-

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[7] Petitioner Pecora contends (Pet. 13–14) that his conviction is invalid because the named "enterprise" was proved "only by facts which also constituted the predicate acts comprising the pattern of racketeering activity." See *United States* v. *Anderson*, *supra*, 626 F.2d at 1372. But this was simply not the case here. The "enterprise" was the office of the prosecuting attorney of Hancock County; the "pattern of racketeering activity" consisted of petitioners' acts of bribery. Proof of the former plainly did not constitute proof of the latter.

timony here.[8] As the court of appeals explained (Pet. App. 8a), "[e]very defendant must decide whether or not to testify. Karas cannot extend his Fifth Amendment rights, via an earlier grant of immunity as a witness, to protect his testimony as a defendant in subsequent judicial proceedings *ad infinitum*."[9]

3. The district court excluded evidence that petitioner Pecora had been involved with slot machines. In his closing argument, defense counsel pointed out that the government had promised in its opening statement to prove Pecora's involvement with slot machines and that no such evidence had been put before the jury. In rebuttal, the prosecutor stated that the court had prevented the government from introducing evidence of the slot machines, but that such evidence was not needed for a conviction because other testimony established three acts of bribery by Pecora (Pet. App. 9a). Shortly after this rebuttal, Pecora moved for a mistrial. He contends (Pet. 17–21) that the district court erred in denying that motion.

In our view, the prosecutor's remark was a fair response to defense counsel's implicit and false suggestion that the government promised evidence that it did

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[8] Petitioner makes much of the Department of Justice letter authorizing the prosecution to grant immunity to petitioner in the trial of his co-conspirator and in "any further proceeding resulting therefrom or ancillary thereto" (Pet. 6). But the letter was merely an authorization, not an actual grant of immunity; moreover, the authorization clearly did not extend to petitioner's own trial.

[9] We also note that Karas has never suggested what testimony he would have given, pursuant to the grant of immunity, that could possibly have changed the outcome of the trial.

not have. See *Lawn* v. *United States*, 355 U.S. 339, 359–360 n.15 (1958); *United States* v. *Ivey*, 550 F.2d 243 (5th Cir.), cert. denied, 431 U.S. 943 (1977); *United States* v. *Crouch*, 528 F.2d 625, 633 (7th Cir.), cert. denied, 429 U.S. 900 (1976); *United States* v. *Stofsky*, 527 F.2d 237, 249 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976). But even if the prosecutor's comment was improper, its prejudicial impact on the jury could not have been significant in view of the overwhelming evidence of Pecora's guilt. To the extent that any prejudice existed, moreover, it was alleviated by the court's charge to the jury that the statements and arguments of counsel are not evidence and that any evidence excluded by the court was to be entirely disregarded (Pet. App. 10a n.6; III A. 667–668). See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644 (1974). In short, the district court did not abuse its broad discretion in this matter (*Arizona* v. *Washington*, 434 U.S. 497, 522 (1978)) by refusing to declare a mistrial.[10]

4. Petitioner Pecora contends (Pet. 15–16) that instead of instructing the jury that RICO requires "a pattern of racketeering activity" consisting of at least

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[10] In *United States* v. *Leon*, 534 F.2d 667 (6th Cir. 1976), upon which Pecora relies (Pet. 17–21), the court found reversible error where the prosecutor characterized the defendant's gambling activities as part of a nationwide scheme that was causing substantial hardship to innocent persons, effecting the decay of the nation's cities, and financing other criminal activity. Unlike the present case, however, the evidence there was neither straightforward nor overwhelming, the challenged statements were more likely to have prejudiced the jury, and the prosecutor continued his prejudicial remarks even after the court had directed him to stop.

two acts of racketeering, the district court erroneously gave a general conspiracy charge under 18 U.S.C. 371 that required only one overt act. This contention is incorrect. Although an inappropriate instruction on the "overt act" requirement under Section 371 was given in the course of the court's general discussion of conspiracy (III A. 677, 678), any resulting misimpression on the part of the jury was subsequently dispelled when the court went into substantial detail in explaining the meaning of "a pattern of racketeering activity" and the requirement of two predicate offenses (III A. 680–681, 685).[11] Reviewing the charge as a whole

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[11] The court instructed the jury in pertinent part (III A. 680–681, 685; emphasis added):

> In order to establish the purpose of the alleged conspiracy charged in the indictment, five essential elements must be established beyond reasonable doubt, as follows: * * *.
>
> Second: that a co-conspirator or conspirators engaged in a pattern of racketeering activity, as here and after defined, by knowingly and wilfully committing or knowingly and wilfully aiding and abetting, *at least two acts of racketeering activity*, as here and after explained.
>
> Third: that *at least two acts of racketeering activity* occurred between the period of January 1, 1977, and ending April 5, 1979, and that the acts were connected with each other by some common scheme, plan, or motive, so as to constitute a pattern and not merely a series of disconnected acts.
>
> Fourth: that through *the proposed commission of two or more connected acts* the defendants would conduct or participate in the conduct of the enterprise.
>
> * * * * *
>
> A "pattern of racketeering activity" requires *at least two acts of racketeering activity*, which were to have occurred between January 1, 1977, and April 5, 1979. It is not necessary that *the two acts* found be acts of the same kind

rather than in isolated segments (*Cupp* v. *Naughten*, 414 U.S. 141, 145–146 (1973)), the court of appeals properly concluded (Pet. App. 4a) that "there is no reason to believe that the jury was misled regarding the requirement of at least two predicate offenses to find a violation under [Section] 1962(d)."

Moreover, the "overt act" instruction actually imposed on the government a greater burden than the RICO statute prescribes. Section 1962(d) provides in its entirety that "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section" (18 U.S.C. 1962(d)); unlike Section 371, there is no requirement that, in order to violate the statute, a conspirator must perform an "act to effect the object of the conspiracy" (18 U.S.C. 371).[12] Cf., *e.g.*, *United States* v. *Rodriguez*, 612 F.2d 906, 919–920 n.37 (5th Cir. 1980) (en banc), cert. granted on other grounds, No. 79–1709 (Oct. 6, 1980) (21 U.S.C. 846); *United States* v. *Knuckles*, 581 F.2d 305, 310–311 (2d Cir.), cert. denied, 439 U.S. 986 (1978) (same); *United States* v. *Dreyer*, 533 F.2d 112, 117 & n.6 (3d Cir. 1976) (same). Thus, to prove a RICO conspiracy, it is sufficient for the government to show

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or nature, so long as you find beyond reasonable doubt that *at least two acts of racketeering activities* occurred within the time specified, and that each was to be connected with the other by some common scheme, plan, or motive, so as to constitute a pattern.

[12] We also note that the Senate Report on Section 1962(d) refers to this Court's decision in *Singer* v. *United States*, 323 U.S. 338 (1945), which held that the Selective Training and Service Act of 1940 (54 Stat. 885) did "not require an overt act for the offense of conspiracy" (323 U.S. at 340). See S. Rep. No. 91–617, 91st Cong., 1st Sess. 159 (1969).

that the defendants *agreed* to commit two acts of racketeering in the conduct of the affairs of the enterprise; actual commission of the racketeering acts is not required. In the present case, the jury was instructed in terms of both an agreement and an overt-act requirement. The court's instruction, having erroneously increased the government's burden, could not have prejudiced petitioners.

5. Petitioners' principal defense at trial was entrapment. Both petitioners contend (80–486 Pet. 15–19; 80–490 Pet. 6–9) that the district court's entrapment charge was inadequate because it allowed the jury to find that the government had satisfied its burden of proving predisposition to commit the alleged RICO offense merely by showing that petitioners were predisposed to engage in unlawful gambling. This claim is rebutted by the record.

The district court's instruction reads in pertinent part (III A. 687–688; emphasis added):

> If, then, the jury should find beyond a reasonable doubt from the evidence in the case, that before anything at all occurred respecting the alleged offense involved in this case, the defendants were ready and willing to commit *the crime charged in the indictment*, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendants are not victims of entrapment.
>
> On the other hand, if the evidence indicates and should leave you with a reasonable doubt whether the defendant had the previous intent or purpose to commit *any offense of the character here charged*, and did so only because they were in-

> duced or persuaded by some officer or agent of the government, then it is your duty to acquit them.

This instruction was plainly sufficient to inform the jury that it should acquit petitioners if it found that they had not been predisposed to commit the RICO offense with which they were charged but had done so as a result of government inducement. Contrary to petitioners' claim, nothing in the instruction even remotely suggests that the government could meet its burden by showing that petitioners were predisposed to gamble.[13]

6. Petitioner Karas contends (Pet. 19–22) that he was entrapped as a matter of law because Altomare and Donell threatened and coerced him into paying the bribes. However, to the extent Karas argues that Altomare, rather than Donell, caused him to pay the bribes, he has not raised a cognizable entrapment defense since Altomare, like petitioner, was a co-conspirator whose only objective was self-enrichment. Whatever Altomare may have done by way of inducing the payments, he had no intention of "entrapping" petitioner for purposes of prosecution. See *Sorrells* v. *United States*, 287 U.S. 435, 442 (1931).

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[13] *Hansford* v. *United States*, 303 F.2d 219 (D.C. Cir. 1962), and *United States* v. *Wolffs*, 594 F.2d 77 (5th Cir. 1979), do not support petitioners' position. In *Hansford*, the court held that predisposition is not established by evidence that the defendant has a criminal record. In *Wolffs*, the court stated that an entrapment instruction must make unmistakably clear that the government bears the burden of showing that the defendants were predisposed "to commit an offense of the character charged" (594 F.2d at 83). The instruction in the instant case did precisely that.

In any event, the evidence clearly established that petitioner was ready and willing to pay bribes to "protect" his gambling business. The evidence showed that petitioner first met with Donell shortly after Donell had been told by Altomare that several gambling operators were willing to pay a $1,500 bribe (Govt. Exh. 29). During their conversation, petitioner told Donell, "You"ll find, I mean, if you talk to a lot of people, that I always keep my word. I always keep my commitments. Now if a guy's good to me and we're working together properly, we're both doing good, I don't care. Listen if I make seventy-five cents, I don't mind giving forty of it away—or thirty of it away, as long as I get something for myself" (Govt. Exh. 30). At the end of the conversation, he added, "If we're making a dollar, I want everybody to make a dollar with me because after all, I can't make one without you and I know it. I can't make money without the Prosecutor" (*ibid.*). Contrary to petitioner's assertion that he was entrapped as a matter of law, this evidence presented an issue of fact for the jury to resolve. Petitioner's obvious readiness to pay the bribes defeated his entrapment defense, as the jury properly concluded.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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